Editor's note: 85 I.D. 140

TOWN OF SILVERTON

IBLA 77-526 Decided May 23, 1978

Appeal from decision of the Colorado State Office, Bureau of Land Management declaring divestiture of title to lands granted under the Act of February 25, 1925 (43 Stat. 980). CO-946(A).

Reversed and remanded.

1. Act of February 25, 1925 -- Patents of Public Lands: Generally -- Public Lands: Disposals of: Generally

"An Act Granting public lands to the town of Silverton, Colorado, for public park purposes" (43 Stat. 980, Feb. 25, 1925).

The above Act and the patent issued in accordance therewith require that the lands granted be used for public park purposes only, and the town's attempt to lease a portion of the lands for the construction of camper sites does not violate the Act and patent since the use of a limited part of the patented land for camper sites is consistent with recreational and public park purposes.

APPEARANCES: William F. Corwin, Esq., Town Attorney, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The town of Silverton, Colorado, appeals from the July 26, 1977, decision of the Colorado State Office, Bureau of Land Management (BLM), revesting in the United States title to certain lands patented to Silverton for alleged violation of the reversionary clause of the patent.

The Act of February 25, 1925 (43 Stat. 980), under which the grant was made, reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted and conveyed to the town of Silverton, Colorado, for public park purposes, the following-described lands or so much thereof as said town may desire to wit:
>
> A tract of land situate[d] in township forty north, range seven west, New Mexico principal meridian, in the county of San Juan and State of Colorado, conforming as nearly as practicable to legal subdivisions, and not exceeding three hundred and twenty acres in extent, which land embraces what is commonly known as lower Molas Lake, in said county.
>
> That such conveyance shall be made of the said land to said town by the Secretary of the Interior, upon the payment by said town for the said land, or such portion thereof as it may select, at the rate of $1.25 per acre, and patent issued to said town for the said land selected, to have and to hold for public park purposes, subject to the existing laws and regulations concerning public parks; and the grant hereby made shall not include any lands which at the date of issuance of patent shall be covered by valid existing bona fide right or claim initiated under the laws of the United States: Provided, That there shall be reserved to the United States all oil, coal, and other mineral deposits that may be found in the land so granted

> and all necessary use of the land for extracting the same: Provided further, That said town shall not have the right to sell or convey the land herein granted, or any part thereof, or to devote the same to any other purpose than as hereinbefore described; and that if the said land shall not be used as a public park, the same, or such parts thereof not so used, shall revert to the United States. [Emphasis added.]

The patent associated with the grant, No. 1027982 (May 31, 1929), also recited that the lands were to be held for public park purposes and contained the identical reversionary clause stated in the Act, supra.

On March 2, 1977, Silverton (appellant) and Hillyer Enterprises (Hillyer), a general partnership, entered a so-called "Maintenance Agreement" (as amended) covering the subject lands. The agreement, as amended by the parties, provides as follows:

> THIS AGREEMENT dated this 2nd day of March, 1977, by and between the Town of Silverton, Colorado, by and through its elected Officers and Officials, hereinafter called the "Party of the First Part" and Hillyer Enterprises, a general partnership, hereinafter called "Party of the Second Part."
>
> WITNESSETH:
>
> The Party of the First Part hereby agrees to lease to the Party of the Second Part on a Maintenance Agreement for public park purposes a tract of land known as Molas Lake Park situated in Section 6 and 7 of Township 40N, R. 7W., of the N.M.P.M., Colorado, more particularly bounded and described as follows:
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> Beginning at corner No. 1; thence South eighty-four degrees, fifty nine minutes West fourteen and twenty-five hundredths chains to

corner No. 2; from which U.S. Location Monument Molas, bears North twenty-two degrees sixteen minutes East fifty-one and four hundredths chains distant; thence, South thirty-eight degrees twenty-five minutes West forty-one and ninety-one hundredths chains to Corner No. 3; thence, South thirteen degrees two minutes East twelve and sixty hundredths chains to corner No. 4; thence, South sixty degrees forty-six minutes east twenty-nine and twenty-eight hundredths chains to Corner No. 5; thence North eleven degrees four minutes East sixty-one and eighty-four hundredths chains to Corner No. 1, the place of beginning, containing one hundred thirty-seven acres and two hundred twenty-seven thousandths of an acre, according to the Official Plat of the Survey of the said Land, on file in the General Land Office. [1/]

1. The Party of the First Part leases the above described real property for public park purposes to the Party of the Second Part for a term of five years beginning January 1, 1977, and ending on December 31, 1982. For leasing the above described property, the Party of the Second Part shall pay to the Party of the First Part, on or before June 1 of each year the sum of $500.00 (Five Hundred Dollars) per year for the lease of the above described real property.

2. The Party of the Second Part shall have the right to install a minimum of thirty-one camp sites on the said property over a period of five years with the right of adding additional camp units as the Party of the Second Part determines feasible and needed as long as the Party of the Second Part meets the requirements of the laws or statutes required by the State of Colorado, County of San Juan, and/or the Town of Silverton.

3. The use of said property by said Party of the Second Part shall be for public park purposes in compliance with 43 U.S.C. Section 980 titled "An Act Granting Public Land to the Town of Silverton, Colorado for Public Park Purposes" and the Party of the Second Part's use shall be limited to the area set forth in paragraph 11, unless modified in writing.

1/ This description encompasses the entire grant and is identical to that contained in the patent.

4. The Party of the Second Part shall have the right to install a portable office and portable store on said property set forth in paragraph 11 for the use of the campsite facilities and also for the use of the general public; such buildings shall be portable building(s) or public home(s) which are adaptable for such use. The approximate size of the building will be 14 feet by 70 feet.

5. The Party of the Second Part shall provide free parking facilities for the public and a free day use area on the said property.

6. The Party of the Second Part shall have all such camping sites bordered by logs, rocks or comparable material and shall furnish fire pits and picnic tables for the use area and shall also have a trash disposal site and sewage disposal site which shall be the responsibility of the Party of the Second Part to maintain.

7. In the event that the Party of the Second Part would wish to install a central water system on the said property, he shall have the right to be able to use any water rights that the Town of Silverton may own or acquire on the said property.

8. The Party of the First Part shall, on or before July 1, 1977, exercise all reasonable effort to extend a road around Molas Lake which shall be open to the use of the public and also to the use of the Party of the Second Part herein.

9. For consideration granted herein and for the additional consideration of Ten Dollars ($10.00), receipt of which is hereby acknowledged, the Party of the First Part grants to the Party of the Second Part an option to renew this Agreement for an additional period of ten years beginning January 1, 1983, and continuing until December 31, 1993. Within thirty days of the expiration of this original Agreement, the Party of the Second Part shall notify the Party of the First Part in writing whether or not he intends to exercise the option for an additional period of ten years. If the Party of the Second Part so elects to exercise this option, the Parties shall negotiate a new Agreement on a flat fee basis.

If such negotiation cannot be reached, then the agreed upon rental rate of the property shall be a percentage of the gross receipts not to be less than 2% nor more than 10% of such gross receipts as shown by the Federal Income Tax Return for Hillyer Enterprises for each year of operation.

10. Changes or additions to the plans for development of the camp sites [as plan of operation] submitted to the Party of the First Part on December 13, 1976, shall be made subject to review [and approval or disapproval] by the Party of the First Part, and subject to recommendations of the then Chairman of the Parks Committee.

11. The area in which the Party of the Second Part shall be allowed to install camper sites and set up a concessionary store for the sale of goods and services is set forth in Exhibit "A" [appellant's Exh. D] attached hereto and made a part hereof.

12. The party of the First Part shall grant unto the Party of the Second Part authority to deal with the United States Government or the Bureau of Land Management as it concerns the area under the Party of the Second Part's control as set forth in Exhibit "A" [appellant's Exh. D] attached hereto. All the dealings concerning the area not under the direct control of the Party of the Second Part shall be retained by the Party of the First Part.

13. The Party of the Second Part shall allow the Party of the First Part the authority to expand the area set forth in Exhibit "A" [appellant's Exh. D]. Such permission shall not [be] withheld unreasonably. However at no time shall the entire area be used by the Party of the Second Part for camper sites. The Party of the Second Part shall not charge for the use of fishery rights at Molass [sic] Lake.

The BLM decision, finding appellant to be in violation of the reversionary provision of the grant states in its dispositive rationale:

Instead of leasing a limited area of the Park for development of a commercial campground, the entire park was leased to Hillyer Enterprises. Although initial plans call for development only perhaps [of] one-third of Park's area, it is evident both from the language contained in the lease and from our discussions with Silverton and Hillyer that development of as much as 90% or more of the Park for commercial campground purposes is ultimately contemplated, subject only to the approval of the Town of

> Silverton. Thus, even if it were possible for us to reconcile use of a portion of land patented for "public park purposes" for the operation of commercial facilities under the theory that such use amounted to no more than a "concession", we are estopped from doing so here by the potential magnitude of the projected development and the degree to which control over the area has been transferred into private hands.

Appellant asserts in its statement of reasons that only that part of the park necessary for the operation of the camper park would be under the control of Hillyer. Appellant refers to a map (appellant's Exh. D) of the Molas Lake Recreation Area dated November 10, 1976. The map contains the label "Hillyer Enterprises Developer" and depicts 31 proposed campsites arranged along a loop access road at one end of the lake. Also shown on the map are a "day use area" along a fraction of the lake shore and a "caravan camping area." Pointing to paragraph 10 of the Maintenance Agreement, appellant urges that the town "has in no way relinquished control over the park."

Appellant also lists improvements made by the town since the time of the grant. Among these are the construction of a 1-mile water ditch, a road around the lake, a small dam to control seepage, and a water line from a spring to the access road.

Appellant asserts further that during 1976, the town spent $3,800 in upkeep, maintenance, toilet rental, and trash removal. Appellant's position is that the Maintenance Agreement was entered

into to eliminate a burdensome expense while preserving the public park character of the area.

Appellant submits that fishery at the lake would be under the control of the state game and fish regulations and that BLM would be at liberty to monitor any fees charged by the town or a private party for camping.

The terms of the original grant contain two specific limitations. The first is that the town shall not have the right to sell or convey the land granted or any part thereof. The second is that the land granted shall not be used other than for public purposes. The question, then, is whether either or both of these limitations would be violated if the Maintenance Agreement between Silverton and Hillyer were put into operation.

Paragraph 2 of the agreement states that Hillyer may install a minimum of 31 camper sites, and has the right to install an indefinite additional number of such sites "as feasible and needed." Paragraph 3 of the original maintenance agreement, as amended by the addendum, however, purports to restrict the use by Hillyer to the area appellant's Exh. D (paragraph 11). We have examined and have previously described Exh. D, which is Hillyer's map of the Molas Lake Recreation Area and which depicts 31 campsites as small rectangles along a loop access road at one end of the lake. Paragraph 13,

embodied in the addendum, is somewhat puzzling in that it appears to delegate to Hillyer the power to allow the town to "expand the area set forth" in the map, subject to the limitation that at no time shall the "entire area" be used for camper sites. Hillyer is obligated to provide free parking and a free day use area.

[1] Although the agreement lacks specificity and clarity in certain aspects we do not think its general intent is to divert the use of the park, or a portion thereof from the particular purpose stated in the grant. We think, on the contrary, that the development contemplated would facilitate and increase the volume of recreational use by the public. Camping, whether by tent or camper, is a leisure and recreational activity in which people engage during their vacation time. The country's national parks are equipped with hygienic facilities, utilities, concessions, etc., to provide an attractive setting for this type of recreational use, and we have found no authorities holding that it is contrary to public park purposes. Camping was held a proper use of an unimproved park in Tobin v. Hennessy, 130 Misc. 226, 223 NYS 676, aff'd 223 App. Div. 10, 227 NYS 363 (1927), and numerous other uses 2/ have been held to be in accord with public park purposes, where municipalities have leased park lands for such uses.

2/ A city was authorized to lease part of a park for a restaurant in Gushee v. New York, 42 App. Div. 37, 58 NYS 967 (1899); a portion of land dedicated as an open public place and park was held available for leasing as a compact golf course in Cohen v. Samuel, 80 A.2d 732 (1951); a library was properly a recreational use in Moore v. Valley Garden Center, 185 P.2d 998 (1947), the court noting in conclusion that there had been a multiplicity of decisions holding that public

Moreover, the lease is not vitiated by the fact that the lessee stands for a private gain where that gain is merely incidental to the primary purpose of serving the public. 3/ See Murphy v. Erie County, 268 N.E.2d 771 (1971) and Annot. 47 ALR 3d 19.

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libraries, art museums, natural history museums, children's play-grounds, conservatories, veterans' memorial halls and buildings, restaurants, zoological and botanical gardens, pioneers' memorial halls, historical societies, baseball parks, swimming pools, golf courses, and countless others constituted a recreational use of land for park purposes.

3/ We note that the laws governing the operation of the National Parks give explicit recognition to private contractors and concessioners. See, e.g., 16 U.S.C. § 1(b) (1970), authorizing the furnishing of utility services to concessioners within the National Park System by the Department; 16 U.S.C. § 3 (1970), authorizing the granting of "privileges, leases, and permits for the use of land for the accommodation of visitors * * * for periods not exceeding thirty years"; 16 U.S.C. § 17(b) (1970), authorizing the Secretary "to contract for services or other accommodations * * *"; 16 U.S.C. § 20 (1970), providing for "concessions, accommodations, facilities, and services in areas administered by the National Park Service"; 16 U.S.C. § 22 (1970), providing for leases up to 20 years in Yellowstone National Park "for the accommodation of visitors"; 16 U.S.C. § 32 (1970), authorizing the Department to lease in Yellowstone up to 10 tracts of 20 acres each to an individual or company "as the comfort and convenience of visitors may require for the construction and maintenance of substantial hotel buildings and buildings for the protection of stage, stock, and equipment"; 16 U.S.C. § 45(a) and (d) (1970), granting authority to the Secretary to issue for Sequoia National Park leases for parcels not exceeding 10 acres at any one place for not to exceed 20 years; and 16 U.S.C. § 55 (1970), authorizing the Department to grant for lands in Yosemite National Park, leases for not to exceed 20 years for tracts up to 20 acres for each place not to exceed ten in number for each person or corporation "as the comfort and convenience of visitors may require * * *." The courts have given judicial recognition to concessionaire contracts affecting the National Parks. Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm., 393 U.S. 186 (1968); United States v. Gray Line Water Tours of Charleston, 311 F.2d 779 (4th Cir. 1962); Eiseman v. Andrus, 433 F. Supp. 1103 (D. Ariz. 1977).

We note also that the town retains the power to approve or disapprove the development and therefore find no violation of the restriction against selling or conveying the lands. Appellant has pointed out that the lands have been a burdensome expense to the town. Cf. Atlas Life Ins. Co. v. Board of Education of City of Tulsa, 200 P. 171 (1921).

In summary, our review permits the conclusion that the lease is for the development, improvement, or enhancement of Molas Lake Park for the benefit and enjoyment of the public.

The agreement states that there may be as much as 137 acres in the lease to be used for camp sites out of a possible total of 320 acres raising the question whether the amount of acreage committed to private development is excessive in terms of the public character sought to be maintained for the lands.

Our findings are restricted solely to the current situation. We express no opinion whether other uses would be in violation of the terms of the patent. We recognize that the agreement authorizes the construction of campsites on 137 acres, but also contemplates that even more land may be devoted to such use. The assignment of more acreage to such use may violate the terms of the patent. The BLM was concerned that all the lands in the park might be devoted to campsites. We share this concern.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge